MOTION FILED

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(6)

No. 99-422

In The
Supreme Court of the United States

MARSHALL SPIEGEL,

Petitioner,

v.

PROBATE PROCEEDING, WILL OF ABRAHAM WARSASKI, DECEASED,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of the State of New York

BRIEF OF AMICUS CURIAE

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Dated: November 8, 1999

MOTION FOR LEAVE TO FILE AN AMICUS CURIAE BRIEF BEFORE THE COURT'S CONSIDERATION OF THE PETITION FOR A WRIT OF CERTIORARI

NOW COME *Amici* in support of Petitioner, MARSHALL SPIEGEL, by their attorney, DAVID C. THOMAS, pursuant to United States Supreme Court Rule 37, and move this Honorable Court for leave to file an Amicus Curiae Brief in support of the Petitioner's Petitioner for Writ of Certiorari and in support state:

1. Respondent, PROBATE PROCEEDING, WILL OF ABRAHAM WARSASKI, DECEASED, through its attorney, Steven Rosenfeld, has not provided its consent to the submission of this *Amicus Curiae* brief in support of the Petitioner's position. However, Petitioner has provided his consent.

2. Petitioner initiated a suit in the Surrogate Court of New York County against Respondent. His attorney, Mr. Meenan, filed an application for a *pro hac vice* appearance about three months prior to trial.

3. The Surrogate Court indicated that it would grant such an application subject to the association of New York counsel. Petitioner quickly complied with the requirement.

4. Mr. Meenan diligently prepared for trial. He is an experienced trial attorney with knowledge in the relevant area of law. He also made it known to the court two and one half months prior to trial that he could not be available on the trial date set by the court, but would be available four court days later.

5. Less than one month prior to trial, and only after Petitioner's counsel inquired, the Surrogate Court denied the

application arbitrarily. The court merely stated that Petitioner had plenty of time to secure counsel and prepare for trial—which Petitioner had done.

6. As a result, Petitioner was required to rely on inexperienced and incompetent counsel, thereby losing his opportunity for a fair trial.

7. Only at the appellate level, was Petitioner advised that the denial was related to Mr. Meenan's request for a four-day adjournment.

8. Relying on *Powell v. Alabama*, 287 U.S. 45 (1932), *Amici* argue that a litigant in a civil proceeding has a qualified Fourteenth Amendment Due Process right to counsel of choice. Such a right cannot be defeated arbitrarily, nor even in the face of the court's interest in time and delay where there exists an overriding need for a particular lawyer.

9. Petitioner's qualified Due Process right to counsel of choice was violated by the Surrogate Court's arbitrary denial of the application for a *pro hac vice* appearance. Additionally, Petitioner had an overriding need for Mr. Meenan's representation.

10. *Amici* are 20 individuals, attorneys and law professors, committed to the principles of the Fourteenth Amendment and concerned with the rights of all parties to select counsel of choice.

11. *Amici* are especially concerned that should the Surrogate Court's decision be upheld, it would severely diminish the ability of many parties to select counsel of their choice and would have a negative impact on the ability of lawyer to represent clients in important cases in other states.

Respectfully submitted,

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QUESTIONS PRESENTED

1. Whether a party to a civil proceeding has a qualified right to counsel of choice?

2. Whether this right is violated when a court arbitrarily denies an application for an appearance *pro hac vice* less than a month before the scheduled date of a trial, where the court had previously indicated that the application for the appearance would be accepted provided the out-of-state attorney obtained local counsel to assist?

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STATEMENT OF INTEREST OF THE AMICI

This *amicus* brief is filed on behalf of 20 individuals, collectively identified as "Concerned Illinois Lawyers and Law Professors," pursuant to Rule 37.2 of this Court.[1] The individual *amici* are a diverse group of lawyers and law professors who practice and teach in Chicago, and are committed to the principles of the Fourteenth Amendment and to the fair and effective administration of justice.

The *amici* have quite divergent positions on a wide range of issues relating to the justice system. However, they share one common view, which prompts their involvement in this brief: the *amici* believe that the New York Surrogate Court's decision in this matter failed to give appropriate consideration to the fundamental right of a party to a civil proceeding to choose his or her own attorney. *Amici* are concerned not simply about the Fourteenth Amendment issue presented in the *Spiegel* case, but more fundamentally about the rights of all parties to select counsel of their choice. *Amici*, a number of whom are lawyers with clients whose litigation is not always conducted in the state in which the lawyers are licensed, are concerned that the New York Surrogate Court's decision in this case, if upheld, would severely diminish the ability of many parties to select counsel of their choice and, correspondingly, would also have a negative impact on the ability of lawyers to represent clients in important cases in other states.

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1 Pursuant to Supreme Court Rule 37.6, counsel for *Amicus Curiae*, David Thomas, states that he has authored this brief in whole, and that no person or entity has made a monetary contribution to the preparation and submission of the brief.

Amici believe that their perspective will complement that of the Petitioner and will provide assistance to this Court in deciding the issues.[2]

2 Respondent has not provided its consent to the submission of this brief. Petitioner has provided his consent.

INTRODUCTION AND SUMMARY

Petitioner, Marshall Spiegel, initiated this suit in Surrogate Court, New York County, objecting to the admission of the will of Abraham Warsaski to probate on the ground that Mr. Warsaski lacked testamentary capacity. In May 1997, over Petitioner's objections, the court permitted Petitioner's attorney at the time, Mr. Richard Leng, appearing *pro hac vice,* to withdraw from the case. The court indicated that a substitute attorney would be given leave to appear as long as an association was made with a New York attorney who would serve as counsel of record, emphasizing the state's rule that an association with a New York attorney is required.[3] A trial date was set for September 5, 1997.

To replace Mr. Leng, Petitioner retained Daniel Meenan, an Illinois lawyer, who immediately began to prepare for trial and submitted a request for admission *pro hac vice.* He also arranged for the co-appearance of a New York licensed attorney, Ms. Joann Rowland. On June 20, 1997, Mr. Meenan and Ms. Rowland informed the court that Mr. Meenan would not be able to proceed until September 11 due to a prior trial commitment on September 8th and 9th, causing a delay of only four days.[4]

Several weeks before trial, the New York attorney checked with the Surrogate Court to ensure that Mr. Meenan

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3 The validity of this rule is not involved in this case.

4 September 5 fell on a Friday in 1997. Thus, although September 11 was six days later, court was only in session for four of those five days.

would be allowed to appear on Petitioner's behalf. Only at that time, less than a month before trial, did the court inform Petitioner that Mr. Meenan would not be admitted *pro hac vice*.

The court proceeded with the trial over Petitioner's objections that Ms. Rowland's role was to be ministerial and that she was to advise on New York law and procedure. She had been retained solely as local counsel, not as trial counsel. The court eventually admitted the will of Mr. Warsaski over Petitioner's objections. In response to Petitioner's argument that the decision to bar Mr. Meenan's appearance had resulted in prejudicial unfairness, the court simply responded that Petitioner was sufficiently notified of the trial date and that "[o]bjectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." (Appendix to Petitioner's Petitioner for Writ of Certiorari [hereinafter Pet.'s App.] at 4.) The court's reasoning made no sense considering that Petitioner had immediately retained counsel, Mr. Meenan, even before Mr. Leng's motion for withdrawal was granted, and Mr. Meenan immediately began preparing for trial and would have been adequately prepared for trial but for the court's ruling.

Upon appeal to the New York Supreme Court, Appellate Division, from the Surrogate Court's refusal to admit Mr. Meenan *pro hac vice* and lack of timely notice to Petitioner, among other issues, the court rejected Petitioner's arguments. The Supreme Court advanced a new reason to

justify the decision of the trial court. The Supreme Court stated that Petitioner was given sufficient notice of the trial date to "justify denial of [Mr. Spiegel's] request for an adjournment by reason of his out-of-State attorney's scheduling conflict." (Pet.'s App. at 2.) The New York Court of Appeals denied Petitioner's motion for leave to appeal.

ARGUMENT

Amici submit this brief to address two essential concerns relevant to the Fourteenth Amendment and the fair and proper administration of justice.

In Part I, we discuss the law relating to the qualified Fourteenth Amendment Due Process right of a litigant in a civil trial to counsel of choice. We also discuss the need to balance this right against the court's obligation to promote the fair and proper administration of justice.

In Part II, we demonstrate that the Surrogate Court of New York County violated the qualified Due Process right to counsel of choice.

I.

A Litigant In a Civil Proceeding Has a Qualified Due Process Right to Counsel of Choice That Cannot Be Overridden Arbitrarily.

As long ago as *Powell v. Alabama*, this Court has recognized a qualified Fourteenth Amendment Due Process right to retained counsel of choice in a civil proceeding. 287 U.S. 45, 69 (1932). This Court stated that

> [i]f in any case, *civil or criminal*, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense.

Id. (emphasis added). It described this right as fundamental in nature. *Id.* at 63, 70. In addition, this Court stated that

"[i]t is hardly necessary to say that the right to counsel being conceded, a [party] should be afforded a fair opportunity to secure counsel of his own choice." *Id.* at 53. However, beyond *Powell*, this Court has not provided guidance regarding the extent of a party's right to counsel of choice in a civil proceeding. *See Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 441 (1985) (resolving case on jurisdictional grounds, in which the revocation of counsel's *pro hac vice* appearance was at issue, without reaching the merits of the revocation issue).

Although the right to counsel of choice for a civil litigant is not absolute, a number of courts have recognized its existence. However, without the guidance of this Court, lower courts have approached the issue in a variety of ways. Notably, the one common theory in these cases is that this qualified right may not be overridden arbitrarily. *See e.g., Robinson v. Boeing Co.*, 79 F.3d 1053, 1056 (11th Cir. 1996) (finding that the existence of a right to counsel of choice is subject to considerations of time delay and loss of prior judicial activity, unless there is an "overriding need for a particular lawyer"); *Hull v. Celanese Corp.*, 513 F.2d 568, 569 (2d Cir. 1975) (stating that "an individual's right to be represented by counsel of his or her choice" must be weighed against "the public's interest in maintaining the highest standards of professional conduct and the scrupulous administration of justice").

The Eleventh Circuit recognized the right to counsel of choice in *Robinson v. Boeing Company*, subject to

considerations of time and delay. 79 F.3d at 1055. In *Robinson*, in order to grant the defendant's motion to add counsel to his defense team, the trial court would have had to reassign the case to another judge. In upholding the trial court's denial of the motion, the Eleventh Circuit noted that the change of judges was a sufficient reason, "in the absence of an *overriding need for a particular lawyer.*" *Id.* at 1056 (emphasis added) (internal quotations omitted). The court defined overriding need as "a need that would reflect upon the litigant's ability to have its case fairly presented, rising to constitutional due process concerns." *Id.* Such a need "would trump both time delay and the loss of prior judicial activity." *Id.*

Similarly, in *Hull v. Celanese Corporation*, the Second Circuit recognized a civil litigant's right to counsel of choice, subject to certain considerations of judicial integrity. 513 F.2d at 568, 572. In *Hull*, an attorney for the defendant corporation sought to intervene as a plaintiff in the same action. The attorney had participated in the defense of this case for several months before seeking to intervene as a party. The law firm she retained to represent her was the same law firm that represented the original plaintiff in the suit. The court was concerned that the attorney had or would subconsciously or consciously communicate, to the law firm representing her, privileged information that she had learned during her participation in the defense of the corporation.

The court upheld disqualification of the law firm representing the attorney. However, in doing so, the court stated that "[r]ecognizably important [is the party]'s right to counsel of her choice," but this consideration "must yield . . . to considerations of ethics which run to the very integrity of our judicial process." *Id.* at 572.

Courts faced with the issue of arbitrary restrictions to *pro hac vice* appearances have held that these restrictions are impermissible, explicitly and impliedly referring to the qualified Due Process right to counsel of choice. For example, in *Sanders v. Russell*, the Fifth Circuit held that Mississippi's arbitrary restriction of one *pro hac vice* appearance per attorney per year impermissibly interfered with a civil litigant's right to counsel of choice. 401 F.2d 241, 245-46 (5th Cir. 1968). In reaching its conclusion, the court stated that "[i]t is difficult to see how the concern of the District court in decorum, dignity, competency, good character or amenability to service and discipline is served by a numerical limitation." *Id.*

In *United States v. Panzardi Alvarez*, a criminal case, the court found that Puerto Rico's statute limiting an attorney's *pro hac vice* appearances to one per year inappropriately interfered with the defendant's right to counsel of choice. 816 F.2d 813, 817 (1st Cir. 1987). Although the right involved to was the Sixth Amendment right to counsel, the opinion was based on this Court's decision in *Powell* recognizing a qualified right to counsel in

both civil and criminal cases under the Due Process Clause. The court in *Panzardi Alvarez* noted that this right must give way only if it interferes with the "fair, efficient and orderly administration of justice." *Id.* at 816. For example, in an "eleventh hour" application for a *pro hac vice* appearance, the defendant must show good cause. But the appearance for the defendant in that case had been filed three months prior to the trial, indicating no interference with the fair and orderly administration of the case.[5] The First Circuit could not discern how Puerto Rico's limitation on the number of *pro hac vice* appearances per year per attorney could advance "the district court's legitimate interest in regulating the conduct of its attorneys." *Id.* at 817.

These cases make clear the existence of a qualified Due Process right to counsel of choice in a civil trial. Since this right is not absolute, it must be balanced with the court's obligation to promote the proper administration of justice. Thus, the right is subject to legitimate considerations of judicial efficiency and integrity. However, this right is not subject to arbitrary whims of the courts. Certainly, this Court would not have recognized such a right in *Powell* if the right could so easily and arbitrarily be defeated. Even considerations such as those of time and delay must give way in the presence of an overriding need for a particular lawyer.

5In the case at bar, the request for Mr. Meenan's appearance was also filed three months prior to the trial date.

II.

Petitioner's Qualified Due Process Right to Counsel of Choice Was Violated When the Surrogate Court of New York Denied Mr. Meenan's Application for a *Pro Hac Vice* Appearance.

In denying Mr. Meenan's application for a *pro hac vice* appearance, the Surrogate Court of New York did not even consider Petitioner's qualified right to counsel of choice. When Petitioner immediately filed his objections that, because of the court's arbitrary and untimely denial of Mr. Meenan's application, Petitioner had no choice but to be represented by counsel who was initially retained for the limited purpose of advising on New York law and procedure, the court's only response was that "[o]bjectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." (Pet.'s App. at 4.) The court did not even acknowledge its role in impeding the proper representation of Petitioner's case by the court's untimely denial of the application. Moreover, Petitioner had promptly retained new counsel in Mr. Meenan who was prepared for trial. Thus, the denial of Mr. Meenan's application was arbitrary in violation of Petitioner's qualified Due Process right to counsel of choice. Moreover, even had the Surrogate Court claimed any interest in commencing the trial on September 5 versus on September 11, this interest was substantially outweighed by Petitioner's overriding need for Mr. Meenan's representation. The error is further aggravated by the trial court's grossly untimely delay in issuing its decision to deny the application, which further impeded Petitioner's exercise of his qualified right to counsel of choice.

A.

The Surrogate Court's Denial of Mr. Meenan's Application Was Arbitrary.

In its decision to deny Mr. Meenan's application for a *pro hac vice* appearance, the trial court stated only that "[o]bjectants are responsible for their failure to promptly retain new counsel and adequately prepare for trial." (Pet.'s App. at 4.) Petitioner had complied with both of these responsibilities. As soon as he realized that Mr. Leng would withdraw his representation, Petitioner immediately retained Mr. Meenan to represent him in this mater. Mr. Meenan then immediately began preparing for trial and would have been prepared had the court abided by its representation that it would allow Mr. Meenan's application to appear *pro hac vice* upon retention of local counsel. Thus, the court's reason did not apply to Petitioner's case. And since the court advanced no other legitimate reasons for denying the application—such as time, delay, ethics or judicial integrity—the court's decision was precisely the kind of arbitrary restriction on *pro hac vice* appearances that the First and Fifth Circuits have held impermissible. *See Panzardi Alvarez*, 816 F.2d at 817; *Sanders*, 401 F.2d at 245-46.

Upon review, the New York Supreme Court Appellate Division listed a different reason for denying Mr. Meenan's application—his request for a four-day adjournment. This reasoning also failed to articulate a legitimate reason. First, the trial court never stated in its opinion that the reason for the denial was the request for a four-day delay. The New York Supreme Court Appellate Division likely noticed that the trial court's stated reason for denying the application did not apply to Petitioner's case and was arbitrary. Then, in an attempt to correct the mistake, the

New York Supreme Court Appellate Division read into the trial court's opinion reasoning that was clearly not there. Second, a four-day delay hardly justifies denying a party's qualified right to counsel of choice, especially where, as discussed below, there is an overriding need to be represented by a particular lawyer. Had the four-day delay truly been the trial court's concern, the court should have granted the application for the appearance, then *immediately* cautioned Petitioner, upon learning of the potential delay, that the court would not move the trial back four days.

B.

The Surrogate Court's Denial of Mr. Meenan's Application Failed to Consider Petitioner's Overriding Need for Mr. Meenan's Representation.

Petitioner had an overriding need for Mr. Meenan's representation that outweighed any trial court interest in time or delay. *See Robinson*, 79 F.3d at 1056 (right to counsel of choice is subject to considerations of time and delay unless there is an "overriding need for a particular lawyer"). Petitioner retained Mr. Meenan to represent him in the matter in June, 1997, relying on the Surrogate Court's representation that it would accept Mr. Meenan's *pro hac vice* application as long as he local counsel was also retained. The Court's order did not indicate that it was subject to any other restrictions.

Based on the Court's representation, Mr. Meenan spent the next two months preparing for trial. Ms. Rowland, the New York attorney retained, did not prepare for trial as she was only retained as local counsel. Thus, when Ms. Rowland contacted the Surrogate Court to ensure that all was well with Mr. Meenan's application, everyone was surprised to learn that the Surrogate Court was going to deny the

application. Prior to August 6, 1997, the Surrogate Court had not provided any indication that it would deny the application; in fact, in its order dated May 29, 1997, the trial court represented the exact opposite, provided that local counsel was retained. (Reprinted in Appendix to this Brief at 1.)

Because of the court's order, Mr. Meenan had conducted extensive preparation for the trial, and Ms. Rowland had not. Her lack of knowledge and experience in the area foreclosed Petitioner's opportunity to a fair trial.

Before the trial, Petitioner was offered $108,000 as a settlement by the Respondent. Ms. Rowland advised the Petitioner to reject the offer. She indicated to Petitioner that certain key evidence in the case would undoubtedly be admitted, implying that Petitioner had a good chance to succeed at trial. However, Ms. Rowland was not properly versed in New York law, and specifically in the New York Dead Man's Statute, despite knowing well ahead of time that certain testimony required for Petitioner's case might raise issues under the Dead Man's Statute. She had represented to Petitioner that she had done all the necessary research in the area. She was wrong on all this advice she gave to Petitioner.

In addition, at the commencement of the trial, it became evident that Ms. Rowland lacked fundamental trial experience. She had also been wrong on all the advice she had given Petitioner. The expert testimony on which Petitioner's case relied was not admitted. Moreover, Ms. Rowland failed to raise evidentiary objections, thereby waiving them for appeal.

After less than one day of trial, Petitioner was not allowed to present any evidence in support of his position. The court consequently directed a verdict against Petitioner. Thus, Petitioner's "ability to have [his] case fairly presented"

was inappropriately hindered by the trial court's decision to reject Mr. Meenan's application, forcing Petitioner to rely on Ms. Rowland's incompetent representation, "rising to constitutional due process concerns." *Robinson*, 79 F.3d at 1056.

C.
The Untimeliness of the Surrogate Court's Denial Further Operated to Impede Petitioner's Exercise of His Qualified Due Process Right to Counsel of Choice.

By waiting until the last minute, the trial court foreclosed all of Petitioner's options in representation, further impeding his exercise of his constitutional right. Because the trial court left Petitioner with less than a month, Petitioner did not have the time to locate qualified counsel with sufficient time to prepare for trial. Thus, Petitioner was left with one avenue—to hire the lawyer, initially retained for limited purposes, to try the case in its entirety on short notice.

Had the trial court ruled on Mr. Meenan's application for a *pro hac vice* appearance as soon as the application was submitted or even when Mr. Meenan first made it known to the court on June 20, 1997 that his appearance might cause a four-day delay, Petitioner would have had a better opportunity to secure competent counsel. In other words, although his constitutional right would still have been violated, Petitioner would have had a better opportunity to exercise his qualified right to counsel of choice than he was given by the court's untimely delay.

CONCLUSION

This Court as well as lower courts have long recognized the Fourteenth Amendment Due Process right of a civil litigant to counsel of choice that cannot be defeated arbitrarily. Even considerations of time and delay must give way to this right when there is an overriding need for a particular lawyer. In the present case, the trial court ignored Petitioner's Due Process right, denying Mr. Meenan's application arbitrarily even though there was a clearly overriding need for Mr. Meenan's representation. Therefore, Petitioner's petition for writ of certiorari should be granted.

Respectfully submitted,
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November 8, 1999

DECISION AND ORDER OF THE HON. RENEE ROTH,
DATED MAY 29, 1997

SURROGATE'S COURT : NEW YORK STATE
COUNTY OF NEW YORK
----------X
Application of RICHARD C. LENG, ESQ.,
for permission to withdraw as counsel
for objections in the probate proceeding,
Will of ABRAHAM WARSASKI

File No. 4323/93

Deceased.
----------X

ROTH, S.

In this contested probate proceeding in the estate of Abraham Warsaski, objectants' counsel seeks permission to withdraw from his representation.

The facts are briefly stated. Testator died on May 19, 1993, survived by his nephews, Marshall and Michael Spiegel. Under the propounded instrument, he disposed of his estate to various charities and disinherited his nephews, who filed objections to one will. During the initial stages of this proceeding, objectants, who live in Illinois, appeared *pro se*. Thereafter, they appeared by Richard C. Leng, an Illinois attorney, who was admitted *pro hac vice* and represented

them in various proceedings, including a summary judgment motion and appeal, discovery, pre-trial motions and trial preparation. The probate trial, originally scheduled for March 10, 1997, was adjourned because of the actual engagement of proponent's counsel.

An attorney may terminate his relationship with his clients for good cause and upon reasonable notice. *Matter of Dunn*, 205 NY 396; see also CPLR §321 [b][2]). Here, it appears that irreconcilable differences have arisen between Mr. Leng and his clients. Also, after the motion was submitted, the Court was informed that objectants had consulted another attorney to represent them in Mr. Leng's place. Accordingly, in the absence of a showing that Mr. Leng's withdrawal would have a material adverse effect on objectant's interest, the motion is granted.

The rules of admission *pro hac vice* have been changed and now provide that any court, in its discretion, may admit an out-of- state attorney to participate in any matter, but that no attorney may be admitted *pro hac vice* unless he or she is associated with an attorney who is a member of the New York bar, who shall be attorney of record (Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law, 22 NYCRR §520.11[b]). The objectants are therefore advised that this Court will not admit another out-of-state attorney *pro hac vice* unless associated with a New York attorney who shall be attorney of record.

Mr. Leng, who is directed to turn over his file in this matter to objectants or their new counsel, shall have a lien for the balance of his compensation, if any, which shall be fixed at the conclusion of the probate proceeding. Further proceeding are stayed for thirty (30) days from the date of service of a copy of this order with notice of entry on both objectants.

The parties shall select a jury on September 5, 1997 at 10 AM and the trial shall commence on September 8, 1997 and 10 AM or as soon thereafter as possible. Mr. Leng is directed to serve a copy of this order with notice of entry on both objectants, counsel for proponent and the Attorney General within 15 days of the date hereof and to file proof of such service with this court.

This decision constitutes the order of the court.

S U R R O G A T E

Dated: May 29, 1997